



DISABILITY DISCRIMINATION LAWS IN THE CALIFORNIA WORKPLACE

California law protects workers with disabilities and requires employers to reasonably accommodate them, unless doing so would cause an undue hardship.

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He writes these guides to put the state’s labor laws into plain English, in neutral terms, with a citation for every claim.



Nobody chooses to have a disability. But, for many, disabilities are a part of life. Sometimes those disabilities can affect a person's employment, so it's important to know which actions constitute *unlawful* disability discrimination.

Disability discrimination is the unfavorable treatment of an employee or job applicant because of a physical or mental impairment. California law prohibits employers with five or more employees from discriminating on the basis of a worker's:¹

-  Physical disability,
-  Mental disability,
-  Medical condition, or
-  Genetic information.²

To qualify for protection, the employee must be able to perform the job's essential functions.³ If an employee requires an accommodation to do their job, the employer has a legal obligation to provide it, unless doing so would involve significant difficulty or expense.⁴

These concepts, and others, are explained in more detail below.

California's Legal Framework



In California, disabled employees are protected by two main pieces of legislation:

-  The federal Americans with Disabilities Act,⁵ and
-  California's Fair Employment and Housing Act.⁶

Some employees may be protected by other laws. For example, people who work for the federal government receive protections from the federal Rehabilitation Act  of 1973.⁷ But those laws do not affect most California employees and are not covered in this article.

1.1 Americans with Disabilities Act (ADA)

The *Americans with Disabilities Act of 1990* (known as the ADA) is a federal law with the stated purpose of providing “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”⁸

The ADA prohibits employers of 15 or more people from discriminating against disabled individuals who can perform the essential functions of a job, even if they need a reasonable accommodation to do so.⁹

The ADA also creates certain standards for when an employee is considered *disabled* and which kinds of accommodations are considered *reasonable*.¹⁰

The ADA is enforced, in part, by the U.S. Equal Employment Opportunity Commission (known as the EEOC). The EEOC is a federal agency responsible for administering many federal laws governing workplace discrimination.¹¹

The EEOC issues ADA-related regulations and decides the outcome of complaints filed with it by employees.¹² In some cases, the EEOC will also pursue an action in federal court against an employer, on a disabled employee's behalf.¹³

1.2 Fair Employment & Housing Act (FEHA)

The *Fair Employment and Housing Act of 1959* (known as FEHA Pronunciation of “FEHA” ) is the State of California's version of the ADA.¹⁴ Its purpose is to provide remedies to employees and eliminate certain discriminatory practices.¹⁵

Under FEHA, employers with five or more employees may not engage in discrimination based on physical disabilities, mental disabilities, medical conditions, or genetic information.¹⁶

FEHA is enforced by the Civil Rights Department (known as the CRD), the state agency formerly called the Department of Fair Employment and Housing (DFEH).¹⁷ The CRD acts as a first resort for many aggrieved employees by providing a process for filing complaints.¹⁸

California has also adopted many regulations implementing FEHA. They are issued by the Civil Rights Council, the CRD's rulemaking body, and are designed, in part, to “ensure discrimination-free access to employment opportunities notwithstanding any individual's actual or perceived disability or medical condition.”¹⁹

These regulations can serve as a valuable tool for employers and employees to interpret FEHA's provisions.

1.3 ADA vs. FEHA: The Main Differences

FEHA was adopted earlier than the ADA, but in 1992 it was revised significantly by the California legislature.²⁰ Those revisions were modeled after the ADA, so the two acts are similar.²¹ The main difference is that FEHA will usually provide more protection for disabled employees.²²

Of note, the ADA does not prevent states or local governments from adopting laws that provide employees with equal or greater protections.²³ This means that California employers are required to comply with the laws that create the highest standards.²⁴

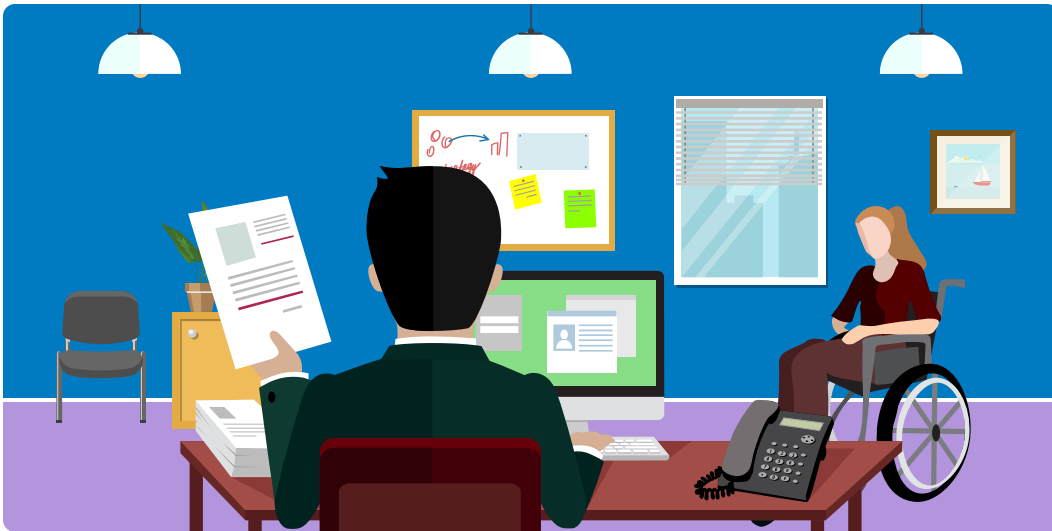
Here are some of the key differences between FEHA and the ADA:

-  The definition of “disability” is broader under FEHA than it is under the ADA.²⁵
-  In situations where the definition of “disability” is *not* broader under FEHA than the ADA, FEHA incorporates the definition that would provide the broadest protections to the employee.²⁶ FEHA's coverage is therefore always at least equal to the ADA's.²⁷
-  The ADA limits the amount of damages employees can recover in a civil case, while FEHA contains no limitations on the amounts an employee can recover.²⁸
-  The ADA only applies to employers with 15 or more employees, while FEHA applies to employers with only five or more employees.²⁹
-  The obligation of an employer to provide reasonable accommodation for an employee with a disability is broader under FEHA than under the ADA.³⁰

These differences can be important for employees who wish to file a claim against their employer. Because FEHA grants more rights to employees than does the ADA, it is often advisable for employees to pursue relief under FEHA instead of the ADA.

This article will focus on the rules applicable under FEHA because FEHA provides greater protections to most California employees than does the ADA. So, unless federal law is specifically mentioned, the law being discussed is FEHA.

Which Employers Can Be Held Responsible



Under California law, an employer can be held responsible for discrimination if they fall into any of the following categories:

-  People or businesses that regularly employ five or more persons,
-  People or businesses who act as an agent of a covered employer, and
-  State or local governmental entities.³¹

Notably, religious associations and religious nonprofit corporations are exempt from this definition.³²

2.1 Employers of Five or More People

Although California law seeks to eliminate disability discrimination from the workplace, it does not apply to very small employers.³³ This means that employees of businesses that employ fewer than five people will have little recourse for discriminatory practices.³⁴

So, to be held legally responsible for discriminatory practices, the employer must be a “person regularly employing five or more persons.”³⁵ California law gives each of these phrases a specific meaning.

-  **“Person.”** A *person* for these purposes includes individuals as well as different types of businesses, corporations, associations, and other legal entities.³⁶
-  **“Regularly Employs.”** An employer *regularly* employs five or more individuals when it employs five or more people for any part of the day on which the allegedly unlawful conduct occurred, or when it employs five or more people on a regular basis.³⁷ “Regular” refers to the recurring nature of the business, not constant employment. A seasonal business that staffs five or more people each season, for example, is covered even if it employs nobody for much of the year.³⁸
-  **“Five or More.”** An employer employs *five or more* individuals when five or more people are under the direction and control of an employer under any employment contract, appointment, or apprenticeship.³⁹ The employment contract can be express or implied, oral or written.⁴⁰

Employees on paid or unpaid leave are counted as employed individuals for these purposes.⁴¹ Likewise, employees who are merely part-time are also counted as employed individuals for these purposes.⁴² Even employees located outside of California count toward the five-employee threshold, although workers outside the state generally aren't themselves protected unless the unlawful conduct occurred in California or was ratified by decision makers located there.⁴³

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Under the Americans with Disabilities Act, a person is an employer under federal law only if they have **15 or more** employees.⁴⁴

2.2 Agents

An *agent* is a person who acts on behalf of an employer.⁴⁵ The employer must agree to have the agent act on its behalf for this type of relationship to exist.⁴⁶

Under both California and federal law, an *agent* of an employer is treated the same as the actual employer.⁴⁷ This means that an employee can sue both the employer and

the employer's agent for the agent's improper acts of discrimination.⁴⁸

The California Supreme Court has confirmed that this rule extends to outside businesses. A business entity acting as an employer's agent (a third-party pre-employment screening company, for example) can be held directly liable under FEHA as an “employer,” at least when the business has five or more employees and carries out FEHA-regulated activities on the employer's behalf.⁴⁹

Importantly, supervisory employees are not technically “agents” for these purposes.⁵⁰

2.3 Supervisors

In general, an employer is legally responsible for the discriminatory actions of its supervisors, managers, or agents. Likewise, an employer can be held liable when supervisors engage in harassment of disabled employees.⁵¹

The improper actions, however, must have been committed within the scope of the employment of the violating supervisor, manager, or agent.⁵²

Importantly, individual supervisors or managers are not personally liable for actions involving discrimination or retaliation, unless they are the actual employer.⁵³ They can, however, be held personally liable for actions involving harassment.⁵⁴

2.4 Coworkers

In general, coworkers do not have authority to take adverse employment actions against employees. Otherwise, they would be considered supervisors. So, lawsuits against coworkers are generally limited to claims of harassment.

A coworker can be held personally liable for harassing an employee with disabilities.⁵⁵ Similarly, the employer can be held liable if:



The employer or any supervisors knew (or should have known) about the coworker's harassing conduct, and



The employer failed to take immediate and appropriate action to correct the harassment.⁵⁶

This is essentially a “negligence” theory of liability. Meaning, an employer will be liable if it negligently permits an employee with a disability to be harassed by

coworkers.⁵⁷

Unlike discrimination claims, harassment claims are not limited to employers of five or more people. For harassment, FEHA covers any person regularly employing one or more persons.⁵⁸

Which Workers Receive Protections



3.1 Employees

California law makes it an unlawful employment practice for an employer to discriminate against “any person” in the employment context.⁵⁹ This includes both current employees and people applying for a job.⁶⁰

For these purposes, an *employee* is any individual who is under the direction and control of an employer.⁶¹ To qualify, the employee must have some sort of paid employment agreement with the employer. That can take the form of an implied agreement, an apprenticeship, or some sort of work appointment.⁶²

3.2 Job Applicants

California's anti-discrimination laws apply equally to employees and people applying to be employees. So, job applicants are often entitled to be free from discrimination on the basis of their disability.⁶³

An employer's refusal to hire or train a person on the basis of their disability is unlawful, unless the same type of discrimination would be permitted against an employee.⁶⁴

3.3 Independent Contractors

Independent contractors are *not* employees entitled to protection from disability discrimination.⁶⁵ They are, however, entitled to be free from disability-related harassment from the employer.⁶⁶

For these purposes, an independent contractor is someone who renders services for a specific price and a specific result.⁶⁷ Independent contractors generally perform their work without supervision, and have control over the way they accomplish their result.⁶⁸

Notably, this control-based definition is different from the stricter “ABC test” that governs most California wage and hour questions. A worker can be an independent contractor for these purposes even if they would be treated as an employee for wage purposes.⁶⁹ To learn more about how worker status is decided in the wage and hour context, please review our article on the difference between independent contractors and employees.

3.4 Exceptions

Employees do *not* receive protections if they are immediate family members of the employer.⁷⁰ Likewise, volunteers or people who are otherwise unpaid generally cannot qualify as employees.⁷¹ Even so, unpaid interns and volunteers are not wholly unprotected: FEHA separately prohibits harassing them, and prohibits discrimination in unpaid internships and similar limited-duration work-experience programs.⁷²

There are a few other categories of workers excluded from the definition of “employee,” like people employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.⁷³ Even those workers, however, may bring a FEHA action for harassment or discrimination, subject to a special affirmative defense for the employer.⁷⁴

When an Impairment is a Qualified “Disability”



California law prohibits discrimination against employees for their *disabilities*.⁷⁵ But not all physical or psychological problems count as legal “disabilities.” To receive protection under California law, an employee must suffer from:

-  A physical disability,
-  A mental disability, or
-  A medical condition.⁷⁶

Along these same lines, an employee is protected from discrimination based on their genetic information.⁷⁷ But that type of discrimination will usually fall into one of the categories above.

The legal characterization of a physical or psychological problem can make an important difference for employees. Employees must meet a specific test to qualify for protection under state and federal law. The exact test will depend on which category, if any, the employee's disability falls under.

4.1 Physical Disabilities

Physical disabilities are the most common type of disability in the workplace. In most cases, a *physical disability* is any bodily condition, cosmetic disfigurement, or anatomical loss that affects one or more of the body's major systems and limits a major life activity.⁷⁸

So, to prove that an employee suffers from a physical disability, they must usually show three things:

-  **Physical Impairment.** The employee has an anatomical loss, cosmetic disfigurement, physiological disease, disorder, or condition.⁷⁹
-  **Major Bodily System.** The condition affects *at least* one of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.⁸⁰
-  **Limited Life Activity.** The condition limits a major life activity.

A worker can also establish that they have a physical disability by showing: that they have any health impairment that requires special education or related services; that they have a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment; or that their employer has a mistaken belief that the worker has or had a physical disability.⁸¹

A condition limits a major life activity if it makes the achievement of that activity difficult.⁸² The phrase “major life activity” is treated broadly. It includes normal social activities, basic life functions (walking, eating, sleeping, etc.), and working.⁸³

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Under the Americans with Disabilities Act, a person has a qualified disability if the condition *substantially* limits a major life activity.⁸⁴

California law does not require the limitation on the employee's life activity to be *substantial*.⁸⁵

In addition to the general test described above, California law has specifically included certain conditions as being within the definition of physical disability:

-  Deafness,

-  Blindness,
-  Missing limbs (whether partial or complete),
-  Mobility impairments requiring the use of a wheelchair,
-  Cerebral palsy, and
-  Chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis, and heart and circulatory disease.⁸⁶

4.2 Medical Conditions

A *medical condition* is defined as any health impairment related to or associated with a diagnosis, record, or history of cancer, or a genetic characteristic known to cause, or associated with an increased risk of, a disease or disorder.⁸⁷ Medical conditions are often an issue with employees who have an increased risk of future health problems.

California law protects employees with medical conditions.⁸⁸ This means that even though an employee is not currently experiencing symptoms, their employer may not discriminate against them.

The existence of a medical condition that exposes the employee to an increased risk of future medical problems renders them legally “disabled” for these purposes, and entitles them to protection.

4.3 Mental Disabilities

A *mental disability*, for these purposes, is any mental or psychological condition that limits a major life activity.⁸⁹ Common examples include:

-  Emotional illnesses,
-  Mental illnesses,
-  Intellectual or cognitive disability,
-  Certain learning disabilities,
-  Autism spectrum disorders,
-  Schizophrenia,
-  Clinical depression,



Bipolar disorder,



Post-traumatic stress disorder, and



Obsessive compulsive disorder.⁹⁰

4.4 Special Case: Pregnancy

In California, it is unlawful for an employer to discriminate against an employee because of pregnancy.⁹¹ Pregnancy discrimination by a qualified employer is always prohibited, regardless of whether the employee is disabled from the pregnancy.

In some cases, pregnant women receive protection from discrimination based on both: their pregnancy, and their pregnancy-related disability. If pregnant women are *disabled* by their pregnancy, they are entitled to a reasonable accommodation unless it would cause the employer an undue hardship.⁹²

Reasonable accommodations can be important for pregnant employees because an employer will sometimes be required to grant a pregnancy disability leave of up to four months.⁹³ Additionally, a reasonable accommodation may be necessary to modify the employee's work conditions and permit the employee to work in comfort.

To be eligible for these types of accommodations, the employee would need to be legally “disabled” by their pregnancy. Meaning, the employee would need to show their pregnancy has limited a major life activity.⁹⁴

To learn more about pregnancy-related rights, please review our article: *Maternity Leave Law in California*.

4.5 Special Case: Obesity

Obesity is generally not treated as a physical disability.⁹⁵ It can, however, become a physical disability if it is caused by something physical and involuntary.⁹⁶

Overweight employees are entitled to protection from disability discrimination if their weight problem resulted from a physiological condition or disorder affecting a body system. Additionally, the employee's weight must limit the employee's ability to participate in major life activities.⁹⁷

4.6 Impairments That Aren't Protected

An employee does *not* have a qualified disability if their condition is mild and temporary.⁹⁸ Mild conditions are determined on a case-by-case basis. They include conditions that have little or no long-term effects.⁹⁹ Examples include:

-  The common cold,
-  Seasonal or common influenza,
-  Minor cuts or abrasions,
-  Sprains,
-  Muscle aches,
-  Soreness,
-  Bruises,
-  Non-migraine headaches, and
-  Minor and non-chronic gastrointestinal disorders.¹⁰⁰

Additionally, California law specifically excludes certain behavioral problems, even though many of them are arguably mental disabilities:

-  Compulsive gambling,
-  Kleptomania,
-  Pyromania,
-  Substance abuse disorders resulting from the current *unlawful* use of drugs, and
-  Certain sexual behavior disorders, like pedophilia, exhibitionism, and voyeurism.¹⁰¹

Notably, transgender people do not have a sexual behavior disorder. California law protects every employee's right to appear or dress consistently with the employee's gender identity or gender expression.¹⁰²

If you're still not sure whether your condition qualifies as a disability, your best bet is to discuss your situation with an employment attorney.

4.7 Employer's Mistake About a Disability

California law protects employees from discrimination based on a *perceived* disability.¹⁰³ This means that employees are protected from disability discrimination even if they do not actually have a disability.

It is a violation if an employer *believed* (whether mistakenly or otherwise) that the employee had a disability or potential disability.¹⁰⁴

The Rule Against Disability Discrimination Generally



California law protects employees from several types of discrimination. Specifically, an employer may not:

-  Refuse to hire a person because of their disability,¹⁰⁵
-  Refuse to select a person for a training program that might lead to employment because of the prospective employee's disability,
-  Fire an employee because of their disability,
-  Pay an employee less than they otherwise would because of the employee's disability, or
-  Restrict other terms, conditions, or privileges of the job.¹⁰⁶

Employers are also prohibited from retaliating against an employee for opposing disability discrimination, or for requesting a reasonable accommodation, regardless of whether the request was granted.¹⁰⁷

If an employee's disability prevents them from doing their job, California law requires employers to make reasonable accommodations for the employee's disability.¹⁰⁸

A *reasonable accommodation* is an adjustment to the employee's work environment that can enable the employee to perform the essential functions of a job.¹⁰⁹

If there is no reasonable way to accommodate the employee's disability in the current position, the employee may still have rights. For example, in some cases the employer will be required to inform the employee of other suitable job opportunities within the company.¹¹⁰

The Duty to Accommodate



California law requires employers to make reasonable accommodations for employees with disabilities.¹¹¹ This duty arises as soon as the employer knows of the disability.¹¹² An employer does not have this duty, however, if the accommodation would cause the employer an undue hardship.¹¹³

6.1 “Reasonable” Accommodations

A *reasonable accommodation* is an adjustment to the employee's work environment that can enable the employee to perform the essential functions of the job.¹¹⁴ The type of adjustment will vary depending on the employee's job and the nature of the disability. Whether a proposed accommodation is *reasonable* is a question of fact, and can be the subject of much debate.¹¹⁵

In general, courts are flexible in considering what accommodations are reasonable.¹¹⁶ And employers are required to consider “any and all” reasonable accommodations they are aware of, unless those accommodations will create an undue hardship.¹¹⁷

Additionally, the employer *must* consider the employee's preference in deciding which kind of accommodation to select.¹¹⁸ Nevertheless, employers have discretion to choose between accommodations that are otherwise reasonable and effective.¹¹⁹

Importantly, however, employers are *not* required to consider an accommodation if it would prevent the employee from performing the *essential functions* of the job. Nor is an employer required to accommodate disabilities that would endanger the employee's health or the health of their coworkers.¹²⁰

Reasonable accommodations often involve making existing facilities readily accessible to individuals with disabilities.¹²¹ They can also include: job restructuring, reassignment to a vacant position, alterations to *when* tasks are to be completed, or changes to *how* functions are performed.¹²² Again, the best type of accommodation will vary from job to job.

In some cases, an employer may be required to permit the employee to have an assistive animal at the work site.¹²³ In others, the employer may be required to permit the employee to take a period of leave for treatment and recovery.¹²⁴ Leaves of absence, however, should usually be treated as a last resort by employers.¹²⁵

If an employer offers an employee a reasonable accommodation, the employee has a right to reject it. The employer may not retaliate against the employee for rejecting the accommodation.¹²⁶ The employer may, however, inform the employee that refusing an accommodation could leave them unable to perform the essential functions of their position.¹²⁷

6.2 Which Job Functions are “Essential”

An employer is only required to provide a reasonable accommodation if the accommodation would permit the employee to perform the *essential functions* of a job. Meaning, California law generally permits an employer to terminate an employee if they are unable to perform the essential functions of the job, even with a reasonable accommodation.¹²⁸

Essential job functions are the fundamental duties of the employment position.¹²⁹ California statutes and regulations have given three examples of reasons why a job function might be considered essential:



A job function is essential if the reason the employee's position exists is to perform that function.



If there are a limited number of employees working for the employer and the job function cannot be distributed among them, it may be essential.



If the employee was hired specifically for their skill or expertise in performing a highly-specialized function, then it may be essential.¹³⁰

Of course, these are just a few examples of when a function might be treated as essential to the job. There may be other situations where courts might find a function essential.¹³¹

Importantly, essential functions differ from what courts call the “marginal functions” of a job.¹³² *Marginal functions* are those that: could be performed by another employee or could be performed in a different way.¹³³ A function is also considered marginal if the employer would need someone with the employee's position even if the function was not being performed by that position.¹³⁴

A simple way to think about these rules is that job functions will generally be essential if the employer would have to hire another person if the employee couldn't perform the particular function. If that wouldn't be necessary, then it is likely that the function is considered marginal.

If the case goes to court, the burden is on the employee to prove that they could perform the essential functions of the job if a reasonable accommodation had been provided.¹³⁵

6.3 When Hardships Become “Undue”

Every accommodation is likely to be somewhat inconvenient for an employer. Fortunately for employees, a mere inconvenience does not exempt an employer from having to accommodate an employee's known disability. The hardship suffered by the employer must be *undue*.

An *undue hardship* is any action that would require significant difficulty or expense on the employer's part.¹³⁶ Courts consider a variety of factors to determine whether an accommodation will cause an undue hardship, including:



The nature and cost of the accommodation needed,



The employer's financial resources,



The impact that the accommodation will likely have on the employer's business operations, and



The overall size of the business.¹³⁷

Of course, each employer is different. So the factors courts will consider may vary from case to case.¹³⁸

6.4 The Worker's Obligation to Notify

To establish a case of unlawful disability discrimination, an employee must show that he or she was subjected to adverse employment action *because of* his or her disability.¹³⁹

In most cases that means that the employer must *know* about the employee's disability.¹⁴⁰ An employer knows an employee has a disability when:

-  The employee tells the employer about his or her condition, or
-  When the employer otherwise becomes aware of the condition, such as through a third party or by observation.¹⁴¹

The employer does not need to know the legal significance of the condition, but it must at least know of the facts underlying the condition's existence and its impact on the employee's work.¹⁴²

The employee should make sure the employer is “on notice” of the disability and the potential need for an accommodation, unless the disability and resulting limitations are obvious.¹⁴³

The same is true if the employee wishes to engage in an interactive process to determine an appropriate accommodation: The employee must initiate the process unless his or her disability and the resulting limitations are obvious.¹⁴⁴

The easiest path is usually for the employee to clearly and directly inform the employer. In doing so, the employee's statements cannot be vague: they must be explicit enough for the employer to understand the facts relevant to the employee's work-related needs.¹⁴⁵

QUICK TIP

It can sometimes be a good idea for employees to provide a notice of their disability in writing. This can come in the form of an email, a dated letter, a text message, or other electronic message.

A written notice can help avoid any confusion and to document the fact that the employee gave the employer notice of the disability. It is important to prevent the employer from later denying their knowledge of the employee's disability or need for an accommodation.

In some situations, the employee may be required to provide medical documentation that confirms the existence of the disability and the need for reasonable accommodation.¹⁴⁶

If the accommodation extends beyond a year, the employee may be required to submit medical documents substantiating the need for continued reasonable accommodations on a yearly basis.¹⁴⁷

6.5 The Duty to Engage in an Interactive Process

An employer is required to engage in an interactive process with employees to determine whether reasonable accommodation is available.¹⁴⁸ This is generally an informal process with the employee or the employee's employment lawyer, where the parties attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively.¹⁴⁹

An employer who fails to engage in this process violates the law.¹⁵⁰ The employer's participation must be timely and in good faith.¹⁵¹ If the process fails, responsibility rests with the party who failed to participate in good faith.¹⁵²

In some situations, the employer may request medical information to confirm the existence of the employee's disability.¹⁵³ If this happens, the employer has a duty to keep that information confidential.¹⁵⁴ There are exceptions to this duty for certain supervisors, managers, government officials, and safety personnel.¹⁵⁵

A claim against an employer for failing to engage in an interactive process is an independent legal cause of action from a failure to accommodate.¹⁵⁶ Meaning, an aggrieved employee can seek financial damages for the employer's failure to participate in an interactive process alone.

6.6 Special Case: Alcohol or Drug Rehab

Employers with 25 or more employees are required to reasonably accommodate an employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program.¹⁵⁷ The employer is not obligated to do so, however, if the accommodation would cause an undue hardship on the employer.¹⁵⁸

This law does not protect an employee whose current use of alcohol or drugs prevents them from performing their duties, or from performing them safely. The employer may still refuse to hire, or may discharge, such an employee.¹⁵⁹

This period of leave is generally unpaid, unless the employee has accumulated sick leave and uses it for this purpose.¹⁶⁰

If the employee chooses to enter an alcohol or drug rehabilitation program, the employer must attempt to safeguard the privacy of that fact.¹⁶¹

Special Types of Cases



7.1 Mixed-Motive Claims

To succeed in a lawsuit, employees are generally required to show the employer was motivated by a discriminatory intent.¹⁶² The problem is an employer's motivations will not always be clear.

In some cases, the employer will be motivated in part by legitimate business reasons, but will also be motivated by improper discriminatory reasons. In other words, an employer can have several motivations for taking a negative employment action against an employee. These are called *mixed-motive* cases.¹⁶³

In a mixed-motive case, the discriminatory intent must have been a “*substantial* motivating factor” in the negative employment action taken against the employee with a disability.¹⁶⁴ So, it is not enough for the employee to merely show that the discrimination was *a* motivating factor, it must have been a ***substantial*** motivating factor.

So, an employee is not required to prove that the discriminatory motivation was the *sole* motivation behind a negative employment action. The employee is only required

to show that there was a *causal connection* between the employee's disability and the action.¹⁶⁵

An employer can reduce its liability if it can show that a legitimate, non-discriminatory motive alone would have led it to make the same decision anyway, regardless of the discrimination.¹⁶⁶ This would not necessarily mean that the employer would be off the hook, however. The employee *might* still be entitled to attorney fees and costs, as well as certain types of non-monetary awards, though, again, only if they could show that the discrimination was a substantial motivating factor in the negative employment action.¹⁶⁷

7.2 Disparate Impact Claims

Most of this article has focused on actions taken by an employer directly against an employee (sometimes called *disparate **treatment** discrimination*). In those kinds of cases, the employer is generally required to have the intent to discriminate against the employee.¹⁶⁸

But California law actually prohibits another type of discrimination, called *disparate **impact** discrimination*. The rule for disparate *impact* discrimination is as follows:

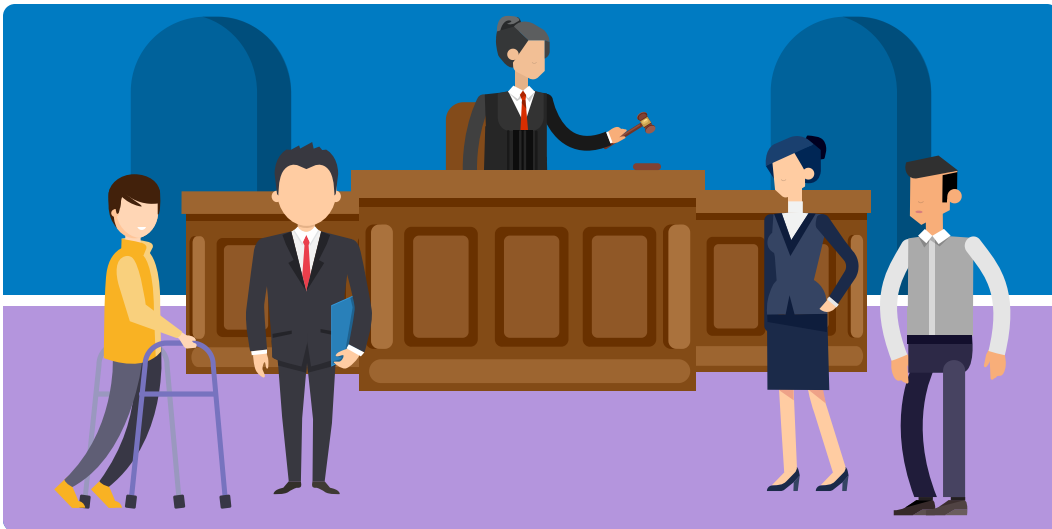
THE BASIC RULE

An employer commits unlawful disability discrimination when they adopt a policy or practice that has a disproportionate effect on employees suffering from a disability and is unrelated to the job's requirements.¹⁶⁹

Disparate impact claims arise when employers adopt policies that are “facially neutral” in that they don't appear to discriminate on the basis of a disability. The policy might be unlawful, however, if it nevertheless has a disproportionately adverse impact on employees with disabilities.

In these kinds of cases, the employer can be held liable even if the employer had no discriminatory intent.¹⁷⁰ To win though, an employee must show that the practice or policy had no clear relationship to job requirements.¹⁷¹

Enforcing a Worker's Rights: Filing a Claim



8.1 Do Employees Need a Lawyer?

Employees are *not* required to have a lawyer to file a claim against their employer. But it is often a good idea to have one.

The law can be complex and very few cases are straightforward. Even if the facts are strong in an employee's case, an experienced employment law attorney can sometimes help by:

-  Collecting all legally-relevant information,
-  Applying the law to the evidence and related facts in a compelling way,
-  Avoiding the strategic pitfalls many nonlawyers are unfamiliar with, and
-  Maximizing the financial damages the employee receives.

Of course, there is no guarantee that a lawyer will be able to accomplish these things. But, when employees handle their legal disputes without representation, there is

sometimes an increased risk that they will lose or severely harm their case due to legal missteps that a lawyer would have avoided.

If the employer contests the employee's claim, which happens often, legal arguments will have to be made and evidence might need to be presented. This might occur in court or with an administrative agency, sometimes according to complicated legal procedures. It can be a good idea to have a lawyer who is familiar with doing those things.

In many cases, attorneys are willing to work with *no upfront costs* on the part of the employee. Instead, they will take a percentage of what the employee wins at the end of the case.

It is also possible that the employer will be required to pay the employee's legal fees at the end of the case. Some laws place the burden of those expenses on the employer because it is easier for them to afford it.¹⁷² A losing employee, on the other hand, generally cannot be ordered to pay the employer's attorney fees unless the court finds the case was frivolous, unreasonable, or groundless.¹⁷³

So, although there is no legal requirement that an employee must have an attorney, navigating the claims process can be much easier if the employee has one.

8.2 Claims Start with a Government Agency

When an employee decides to sue their employer, they must first file a written complaint with an administrative agency.¹⁷⁴ Employees pursuing a disability discrimination claim *cannot* go straight to court with a lawsuit.¹⁷⁵ This process is referred to as “exhausting” the employee's administrative remedies.

If the employee is bringing claims under state law only, the complaint should be filed with California's Civil Rights Department (the CRD).¹⁷⁶ Complaints can be filed online through the CRD's California Civil Rights System, or by mail, email, or phone. The CRD has explained more about their process here [↗](#).

If the employee is bringing claims under federal law, the complaint can be filed with either the CRD or the U.S. Equal Employment Opportunity Commission (the EEOC). When a complaint is filed with the CRD, courts consider it to have also been filed with the EEOC.¹⁷⁷

So, filing the complaint in either agency satisfies the employee's obligations in this regard. If the employee chooses to file with the EEOC, they can find more information about the process here [↗](#).

If, after a complaint is filed with the appropriate administrative agency, the claim is not resolved by either the EEOC or the CRD, the employee will be issued a document called a right-to-sue letter.¹⁷⁸ The employee may then pursue their case by bringing a lawsuit in court. An employee who prefers to go straight to court can also request an immediate right-to-sue notice from the CRD without waiting for an investigation.¹⁷⁹

8.3 The Deadline to File (Statute of Limitations)

Employees are up against strict deadlines when pursuing relief for disability discrimination. If the employee is bringing claims under state law, they must file a complaint against the employer with the Civil Rights Department (CRD) no later than **three years** from the date of the alleged discriminatory act.¹⁸⁰

If the employee has gone through the administrative process and has been issued a right-to-sue letter from the CRD, the employee will then have **one year** to file a lawsuit in civil court against the employer.¹⁸¹ This one-year clock starts ticking on the date the right-to-sue letter is issued. One exception: if the employee timely appeals the CRD's decision to close their complaint, the one-year deadline is tolled until one year after the CRD gives written notice that the complaint remains closed following the appeal.¹⁸²

If the employee is pursuing federal relief, they must file a complaint with either the CRD or the U.S. Equal Employment Opportunity Commission (the EEOC) within **300 days** of the alleged discriminatory act.¹⁸³ If either agency issues a right-to-sue letter, the employee will have **90 days** to file a lawsuit in court based on federal claims.¹⁸⁴

There are, of course, exceptions to these time limits. You should speak with a lawyer immediately if you are unsure whether your claim is time-barred.

8.4 The Burden of Proof

A *burden of proof* refers to the standard of evidence that a party must produce to prove their claim. In employment discrimination cases, the employee usually has the initial burden to prove their case.¹⁸⁵ Meaning, if they cannot present sufficient evidence they will lose the case.

The General Standard

The employee's initial burden is to establish what is called a *prima facie* case of discrimination.¹⁸⁶ This means that the employee must present evidence to prove each fact essential to the claim.¹⁸⁷ In this context, that usually means proving each of the following facts:



The employee suffered a disability,



The employee could perform the essential functions of the job with or without reasonable accommodation,¹⁸⁸ and



The employer took an adverse employment action against the employee because of the disability.¹⁸⁹

The employee's initial burden is to prove each of these facts by a *preponderance of the evidence*.¹⁹⁰ A preponderance of the evidence exists when it is more likely than not that a fact exists.¹⁹¹

This might sound difficult to overcome, but the burden is actually somewhat light. Because it is rare for employees to have direct evidence of an employer's discriminatory intent, courts have emphasized that the employee's burden here “is not an onerous one.”¹⁹²

Courts therefore permit employees to prove their case through indirect or circumstantial evidence that they were the victims of discrimination.¹⁹³ As such, an employee can win a case where the evidence permits the fact-finder (either the judge or a jury) to reasonably infer that discrimination occurred.¹⁹⁴

If the employee meets his or her initial burden, the burden then shifts to the employer. The employer will be required to offer a legitimate, non-discriminatory reason for the adverse employment action. If it does not, then the employee wins.¹⁹⁵

If the employer meets its burden, the employee will then be responsible for attacking the employer's reasons or showing that they were merely a pretext for discriminatory behavior.¹⁹⁶ In pretext cases, the employee does not need to prove that the discriminatory motive was the sole motivation behind the employer's action. It is enough that there is a “causal connection” between the employee's disability and the adverse employment decision.¹⁹⁷

Special Case: Reasonable Accommodation Claims

A reasonable accommodation claim is a case brought by an employee who alleges that the employer failed to provide reasonable accommodations for the employee's known disability.¹⁹⁸ In these cases, a critical fact that employees need to prove is that they could perform the *essential functions* of the job.¹⁹⁹

California law has provided several examples of the kind of evidence parties can use to help prove that a particular job was essential.²⁰⁰ To prove that a job is essential, the party can show:

-  The employer thought the job was essential.
-  A current and accurate written job description indicates the importance of specific functions.
-  The amount of time employees spend performing the function indicates it is essential.
-  There are legitimate business consequences if the job function is not completed.
-  A collective bargaining agreement (i.e., a union contract) describes the job or the job functions in a way that evidences it is essential.
-  Previous employees performing the function think it is essential.
-  Coworkers in similar positions, or performing similar functions, think the job function is essential.
-  The employer has given the employee performance reviews in the past in which the importance of the job function was referenced or emphasized.²⁰¹

8.5 Crafting Arguments

When an employee seeks to enforce their rights, they must rely on legal authority to do so. Legal authority will usually be found in statutes and published court decisions. It is not enough that what happened to an employee was *unfair*. The action taken by the employer must have been *unlawful* in some way.

Unfortunately, California law is not always perfectly clear. Many California employees and lawyers will therefore have to make legal arguments to support their right to some sort of financial benefit or other remedy under the law.

Every argument should begin with the text and the purpose of the law.²⁰² If there is still uncertainty, California courts will rely on several resources to interpret the law:

-  Prior state and federal case law,
-  The decisions of federal or state agencies, and
-  Regulations adopted by the EEOC and the Civil Rights Council (the CRD's rulemaking body).

State Court Case Law

California courts follow a legal principle called *stare decisis*. Stare decisis is the practice of following the decisions of previous cases that were decided by higher courts. A case that must be followed is called “precedent.”²⁰³

Put another way, courts and administrative agencies are required to follow the decisions of higher courts if those cases establish a rule of law or have facts that are indistinguishable from the current case.

Importantly, appellate cases only have value in lower courts if they have been published.²⁰⁴

Federal Court Case Law

California state courts aren't required to follow the decisions of federal courts when it comes to interpreting state law.²⁰⁵ And, with the exception of the Supreme Court, state courts aren't required to follow federal court decisions, even on topics of *federal* law.²⁰⁶

Nevertheless, California courts commonly use federal cases as persuasive authority to interpret California law.²⁰⁷ Federal cases can help explain the way the law was intended to operate.

California courts only use federal cases, however, if the cases interpreted provisions of the law that California law was modeled after.²⁰⁸

Agency Decisions

The decisions of state and federal agencies can be very persuasive for courts trying to decide how a law should be interpreted.²⁰⁹ This is because administrative agencies were specifically tasked by the legislature to enforce and define the relevant laws.²¹⁰

The California Supreme Court has suggested that the decisions of administrative agencies should be “entitled to great weight.” Courts will therefore be hesitant to overturn them unless they are clearly wrong.²¹¹ This is particularly true when the agency's interpretation has been consistent for a long time.²¹²

Nevertheless, some notable cases have rejected the interpretations of administrative agencies.²¹³

State Regulations

Like agency decisions, the regulations interpreting FEHA express an interpretation of California's laws. Today, those regulations are adopted by the Civil Rights Council, the rulemaking body attached to the Civil Rights Department (CRD).²¹⁴ California courts have the authority to disregard that interpretation, but generally don't do so. The regulations can be found in sections 10000 through 11141 of Title Two of the California Code of Regulations [↗](#).

Courts will defer to the agency's interpretation of the Fair Employment and Housing Act because it is the agency's area of expertise.²¹⁵ The only time courts reject the regulations is when the agency's interpretation of the law flies in the face of the clear language and purpose of the interpreted provision.²¹⁶

Federal Regulations

The U.S. Equal Employment Opportunity Commission (the EEOC, for short) has adopted many regulations, which can be found here [↗](#). Their purpose is to help implement the ADA.²¹⁷ They provide enforceable standards addressing workplace discrimination prohibited by the ADA.²¹⁸

Although EEOC regulations only control *federal* law, they have been described by California courts as “useful.”²¹⁹ They can sometimes help us understand how California's anti-discrimination laws were intended to be applied.

That usefulness, however, is limited. A federal regulation will *only* be helpful in crafting arguments when it interprets the meaning of a federal statute that California's version of the rule was modeled on.²²⁰

Policy Considerations

If all else fails, sometimes an argument can be supported by an appeal to public policy. This kind of argument would argue that a court should give consideration to the consequences that would flow from a particular legal interpretation.²²¹ Relevant considerations would include: the history of the law, and any expressions of legislative intent from when the law was adopted.²²²

8.6 Choosing Federal or State Court

As explained above, there are important differences between federal and state law when it comes to protecting employees with disabilities.

In most situations, California employees benefit more from state law than federal law. So it is usually advisable to pursue litigation in state court.

In addition to the damages available and the lower burden, California state courts provide a critical benefit: a jury decision in favor of the employee can be reached with only nine out of twelve jurors.²²³ In federal court, on the other hand, juries must be unanimous.²²⁴

So, a lawsuit in California courts will usually be much easier (although by no means guaranteed) than one brought in federal court.

There may be procedural benefits to pursuing a case in federal court, however. Some lawyers, for example, are well-acquainted with the ways of obtaining evidence in federal court (called “discovery”) and can use that experience to gain a tactical advantage.

Before deciding whether to file the claim in federal or state court, it is important to discuss the case with a lawyer.

8.7 Removing a Case from State Court to Federal Court

In crafting a lawsuit, it is important to consider the kinds of actions an employer can take to gain an advantage. One issue is called “removal.” *Removal* is the process of transferring a case from state court to federal court. An employer might choose to do this if they believe it will give them a procedural benefit.

Any civil lawsuit may be removed to federal court *if it could have been brought there initially*.²²⁵ This will usually be an option where one of the following situations is present:



Federal Claim. The lawsuit alleges claims arising under federal law, like those under the ADA;²²⁶



Different States Involved. The lawsuit alleges damages of more than \$75,000 and the parties are from different states;²²⁷ or



Large Class Actions. The lawsuit is a class action case involving more than \$5 million.²²⁸

The first ground for removal (where a federal claim is made) will often incentivize employees to pursue disability discrimination claims under state law. If federal claims are pursued, that could expose the case to being removed to federal court by the defendant. Strategically speaking, that might not be advisable.

Considerations like these are an example of why it is important to discuss an employment case with a lawyer before filing.

References

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| 1 | Gov. Code, §§ 12926, subd. (d) [defining "employer"], 12940, subd. (a). |
| 2 | Gov. Code, §§ 12926, subds. (g), (i), (j), (m), 12926.1, 12940, subd. (a). |
| 3 | Gov. Code, § 12940, subd. (a)(1); <i>Green v. State of California</i> (2007) 42 Cal.4th 254, 262. |
| 4 | Gov. Code, § 12940, subds. (a), (m); Cal. Code of Regs., tit. 2, § 11068, subd. (a). |
| 5 | 42 U.S.C. §§ 12101–12213. |
| 6 | Gov. Code, § 12900 et seq. |
| 7 | See 29 U.S.C. § 701 et seq. |
| 8 | 42 U.S.C. § 12101(b)(2). The ADA has since been modified by the ADA Amendments Act of 2008, which kept the ADA's original purpose but expanded the rights it provided. (Pub.L. No. 110-325 § , § 2, 122 Stat. 3553.) |
| 9 | <i>US Airways, Inc. v. Barnett</i> (2002) 535 U.S. 391 [122 S.Ct. 1516]; 42 U.S.C. §§ 12111(2), (8), 12112(a). |
| 10 | 42 U.S.C. §§ 12102, 12112(b)(5)(A). |
| 11 | 42 U.S.C. §§ 2000e-4, 2000e-5; 29 C.F.R. § 1601.1. |
| 12 | 42 U.S.C. §§ 12116, 12117. |
| 13 | <i>EEOC v. Waffle House, Inc.</i> (2002) 534 U.S. 279, 291–292 [122 S.Ct. 754, 762–763]. |
| 14 | Gov. Code, § 12900 et seq. |
| 15 | Gov. Code, § 12920. |
| 16 | Gov. Code, §§ 12920, 12940, subd. (a). |
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- 17 Gov. Code, §§ 12925, subd. (b) [defining "department" as the Civil Rights Department], 12930. The department was renamed by Senate Bill 189, effective June 30, 2022. (Stats. 2022, ch. 48, § 33.)
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- 18 Gov. Code, § 12960, subd. (c); Cal. Code of Regs., tit. 2, §§ 10002–10034.
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- 19 Gov. Code, § 12935, subd. (a); Cal. Code of Regs., tit. 2, § 11064, subd. (b); see also Cal. Code of Regs., tit. 2, §§ 11005–11098.
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- 20 Stats. 1992, ch. 913, § 1; *Green v. State of California* (2007) 42 Cal.4th 254, 263.
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- 21 *Diaz v. Fed. Express Corp.* (C.D.Cal. 2005) 373 F.Supp.2d 1034, 1053; *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1060 [“The 1992 amendment to section 12926 is modeled, in turn, on the ADA.”].
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- 22 Gov. Code, § 12926.1 [“Although the federal act provides a floor of protection, this state’s law has always, even prior to passage of the federal act, afforded additional protections.”]; see also 42 U.S.C. § 12201, subd. (b) [“Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.”].
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- 23 29 C.F.R. § 1630.1(d) [“This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than is afforded by this part.”].
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- 24 E.g., *Bragdon v. Abbott* (1998) 524 U.S. 624, 632 [the ADA “grant[s] at least as much protection as provided by the regulations implementing the Rehabilitation Act”].
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- 25 Compare 42 U.S.C. § 12102(1)(A) [requiring disabilities to *substantially* limit one or more major life activities] with Gov. Code, § 12926 [requiring disabilities to merely limit a major life activity, or make it difficult]; see also 29 C.F.R. § 1630.2(j) [defining when an impairment “substantially limits” a major life activity]; Cal. Code of Regs., tit. 2, § 11065, subds. (d) (8), (l)(3) [defining when an impairment “limits” a major life activity].
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- 26 Gov. Code, § 12926, subd. (n).
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27	Gov. Code, § 12926.1, subd. (a).
28	42 U.S.C. § 1981a(b)(3); <i>Peatros v. Bank of America</i> (2000) 22 Cal.4th 147, 166–167 [FEHA “allows the employee to obtain ‘all relief generally available,’ specifically ‘in noncontractual actions’ [citations], including ‘unlimited compensatory and punitive damages’ [citations].”].
29	42 U.S.C. § 12111(5); Gov. Code, § 12926, subd. (d).
30	<i>Bagatti v. Department of Rehabilitation</i> (2002) 97 Cal.App.4th 344, 362; Gov. Code, § 12926.1.
31	Gov. Code, § 12926, subd. (d).
32	Gov. Code, § 12926, subd. (d).
33	Gov. Code, §§ 12920, 12926, subd. (d).
34	See, e.g., <i>Jennings v. Marralle</i> (1994) 8 Cal.4th 121, 130 [“Thus, while the Legislature has made a broad statement of policy, it has not extended that policy to small employers. The FEHA gives plaintiff no remedy as defendant does not regularly employ five or more persons.”].
35	Gov. Code, § 12926, subd. (d).
36	Gov. Code, § 12925, subd. (d).
37	Cal. Code of Regs., tit. 2, § 11008, subd. (f)(1).
38	Cal. Code of Regs., tit. 2, § 11008, subd. (f)(1)(A).
39	Cal. Code of Regs., tit. 2, § 11008, subds. (e), (f).
40	Cal. Code of Regs., tit. 2, § 11008, subds. (e), (f).
41	Cal. Code of Regs., tit. 2, § 11008, subd. (f)(1)(B).
42	Cal. Code of Regs., tit. 2, § 11008, subd. (f)(1)(B).
43	Cal. Code of Regs., tit. 2, § 11008, subd. (f)(1)(C).
44	42 U.S.C. § 12111(5)(A); 29 C.F.R. § 1630.2(e)(1).
45	Civ. Code, § 2295.
46	<i>Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward</i> (2011) 200 Cal.App.4th 81, 91 [“An agency relationship is a <i>bilateral</i> matter created through <i>mutual</i> consent.”].

- 47 Gov. Code, § 12926, subd. (d); Cal. Code of Regs., tit. 2, § 11008, subd. (f) (3); 42 U.S.C. § 12111(5)(A); 29 C.F.R. § 1630.2(e)(1).
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- 48 Gov. Code, §§ 12940, subd. (a), 12960, subd. (c).
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- 49 *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268 [“an employer's business entity agents can be held directly liable under the FEHA for employment discrimination in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer”]; see also Cal. Code of Regs., tit. 2, § 11008, subd. (b) [an agent of an employer “is also an ‘employer’ for purposes of the Act”].
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- 50 *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 66 [“[W]e reject the contention that individual supervisory employees are at risk of personal liability for age discrimination on the theory that the ‘agent’ language in the statute defines them as an ‘employer’ for purposes of liability.”].
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- 51 *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707 [“When the harasser is a supervisor, the employer is strictly liable for the supervisor's actions.”].
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- 52 Cal. Code of Regs., tit. 2, § 11009, subd. (b).
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- 53 *Reno v. Baird* (1998) 18 Cal.4th 640, 663 [“[W]e conclude that individuals who do not themselves qualify as employers may not be sued under the FEHA for alleged discriminatory acts.”]; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [“[W]e conclude that the employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation.”].
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- 54 Gov. Code, § 12940, subd. (j)(3).
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- 55 Gov. Code, § 12940, subd. (j)(3).
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- 56 Gov. Code, § 12940, subd. (j)(1) [“Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.”].
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57	<i>Roby v. McKesson Corp.</i> (2009) 47 Cal.4th 686, 707 [“When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action).”].
58	Gov. Code, § 12940, subd. (j)(4)(A).
59	Gov. Code, § 12940, subd. (a).
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61	Cal. Code of Regs., tit. 2, § 11008, subd. (e).
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63	Gov. Code, § 12940, subd. (a).
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66	Gov. Code, § 12940, subd. (j)(1) [“It is an unlawful employment practice . . . [f]or an employer . . . to harass an employee, an applicant, an unpaid intern or volunteer, or a <i>person providing services pursuant to a contract</i> .”], emphasis added. For who counts as a person providing services pursuant to a contract under this provision, see Gov. Code, § 12940, subd. (j)(5).
67	Labor Code, § 3353; Cal. Code of Regs., tit. 2, § 11008, subd. (e)(1).
68	Labor Code, § 3353; <i>Antelope Valley Press v. Poizner</i> (2008) 162 Cal.App.4th 839, 852 [“[T]he right of the person to whom services are rendered to control the manner and means of accomplishing the desired result of those services is a significant factor for determining whether the person performing the work is an employee or an independent contractor.”].
69	Cal. Code of Regs., tit. 2, § 11008, subd. (e)(1) [adopting the definition in Labor Code, § 3353]; compare Labor Code, § 2775 [codifying the ABC test for Labor Code and wage order purposes].
70	Cal. Code of Regs., tit. 2, § 11008, subd. (e)(2).
71	See <i>Mendoza v. Town of Ross</i> (2005) 128 Cal.App.4th 625.
72	Gov. Code, § 12940, subds. (c), (j)(1).

73	Gov. Code, § 12926, subd. (c).
74	Gov. Code, § 12926.05, subds. (a), (b).
75	Gov. Code, § 12940, subd. (a).
76	Gov. Code, § 12920.
77	Gov. Code, §§ 12920, 12926, subd. (g); Cal. Code of Regs., tit. 2, § 11065, subd. (h) [“Genetic information,’ . . . means genetic information derived from an individual’s or the individual’s family members’ genetic tests, receipt of genetic services, participation in genetic services clinical research or the manifestation of a disease or disorder in an individual’s family members.”].
78	Gov. Code, § 12926, subd. (m)(1); <i>Soria v. Univision Radio Los Angeles, Inc.</i> (2016) 5 Cal.App.5th 570, 584; <i>Colmenares v. Braemar Country Club, Inc.</i> (2003) 29 Cal.4th 1019, 1026.
79	Gov. Code, § 12926, subd. (m)(1).
80	Gov. Code, § 12926, subd. (m)(1)(A).
81	Gov. Code, § 12926, subd. (m).
82	Gov. Code, § 12926, subd. (m)(1)(B)(ii) [“A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.”].
83	Gov. Code, § 12926, subd. (m)(1)(B)(iii) [“Major life activities’ shall be broadly construed and includes physical, mental, and social activities and working.”]; Cal. Code of Regs., tit. 2, § 11065, subd. (l)(1) [“Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.”].
84	42 U.S.C. § 12102(1)(A) [“The term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual . . . ”].
85	Gov. Code, § 12926.1, subd. (d) [“[T]he Legislature intends . . . to require a ‘limitation’ rather than a ‘substantial limitation’ of a major life activity . . . ”].

- 86 Cal. Code of Regs., tit. 2, § 11065, subd. (d)(2)(C).
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- 87 Gov. Code, § 12926, subd. (i); Cal. Code of Regs., tit. 2, § 11065, subd. (d)(7).
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- 88 Gov. Code, § 12940, subd. (a).
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- 89 Gov. Code, § 12926, subd. (j)(1); Cal. Code of Regs., tit. 2, § 11065, subd. (d)(1).
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- 91 Gov. Code, §§ 12926, subd. (r)(1)(A), 12940, subd. (a), 12945.
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- 92 *Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1339 [“Under section 12940, a woman disabled by pregnancy is entitled to the protections afforded any other disabled employee—a reasonable accommodation that does not impose an undue hardship on her employer.”]; Cal. Code of Regs., tit. 2, § 11068, subd. (a).
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- 93 Gov. Code, § 12945, subd. (a)(1).
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- 94 Gov. Code, § 12926, subd. (m)(1).
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- 95 *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1028.
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- 96 See *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1065 [“[A]n individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition.”].
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- 97 *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1028–1032.
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- 98 Cal. Code of Regs., tit. 2, § 11065, subd. (d)(9)(B).
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- 99 See, e.g., *Muller v. Auto. Club of So. Cal.* (1998) 61 Cal.App.4th 431, 440–444 [no disability found where employee suffered from a mere temporary anxiety disorder].
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- 100 Cal. Code of Regs., tit. 2, § 11065, subd. (d)(9)(B) [“‘Disability’ does not include: . . . conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches,

soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders.”].

101 Gov. Code, § 12926, subd. (j)(5); Cal. Code of Regs., tit. 2, § 11065, subds. (d)(9)(A) [“‘Disability’ does not include: . . . compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, and “sexual behavior disorders”], (q).

102 See Gov. Code, § 12949.

103 Gov. Code, § 12926.1, subd. (c) [“It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment”]; Cal. Code of Regs., tit. 2, § 11065, subd. (d)(5).

104 *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 124, 133–134.

105 *Sada v. Robert F. Kennedy Med. Ctr.* (1997) 56 Cal.App.4th 138, 148 [“The FEHA makes it unlawful ‘[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person’”].

106 Gov. Code, § 12940, subd. (a).

107 Gov. Code, § 12940, subds. (h), (m)(2).

108 Gov. Code, § 12940, subd. (m)(1) [“It is an unlawful employment practice . . . [f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.”].

109 *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373.

110 *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [“[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or

benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees.”].

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- 111 Gov. Code, § 12940, subds. (a), (m); *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54 [“In addition to a general prohibition against unlawful employment discrimination based on disability, FEHA provides an independent cause of action for an employer’s failure to provide a reasonable accommodation for an applicant’s or employee’s known disability.”].
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- 112 Cal. Code of Regs., tit. 2, § 11068, subd. (a).
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- 113 Cal. Code of Regs., tit. 2, § 11068, subd. (a).
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- 114 *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373.
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- 115 *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228, fn. 11 [“the reasonableness of an accommodation is generally a factual question”].
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- 116 *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 948.
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- 117 Cal. Code of Regs., tit. 2, § 11068, subd. (e).
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- 118 Cal. Code of Regs., tit. 2, § 11068, subd. (e).
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- 119 *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228 [“[T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.” (Quotation marks omitted.)], quoting *Hankins v. The Gap, Inc.* (6th Cir. 1996) 84 F.3d 797, 800–801.
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- 120 *Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 798 [“An employer may refuse to hire persons whose physical handicap prevents them from performing their duties in a manner which does not endanger their health.”].
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- 121 Gov. Code, § 12926, subd. (p)(1).
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- 122 *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 374; Gov. Code, § 12926, subd. (p)(2); Cal. Code of Regs., tit. 2, § 11065, subd. (p)(2).
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- 123 Cal. Code of Regs., tit. 2, § 11065, subd. (p)(2)(B).
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- 124 Cal. Code of Regs., tit. 2, §§ 11065, subd. (p)(2)(M), 11068, subd. (c).
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- 125 Cal. Code of Regs., tit. 2, § 11068, subd. (c) ["When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence."].
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- 126 Cal. Code of Regs., tit. 2, § 11068, subd. (f).
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- 127 Cal. Code of Regs., tit. 2, § 11068, subd. (f).
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- 128 Gov. Code, § 12940, subd. (a)(1) ["This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations"].
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- 129 Gov. Code, § 12926, subd. (f).
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- 130 Gov. Code, § 12926, subd. (f)(1); Cal. Code of Regs., tit. 2, § 11065, subd. (e)(1)(A); *Lui v. San Francisco* (2012) 211 Cal.App.4th 962, 972.
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- 131 See, e.g., Gov. Code, § 12926, subd. (f)(1) ["A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following"].
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- 132 Gov. Code, § 12926, subd. (f); Cal. Code of Regs., tit. 2, § 11065, subd. (e)(3).
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- 133 Cal. Code of Regs., tit. 2, § 11065, subd. (e)(3) ["'Marginal functions' of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way."].
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- 134 Cal. Code of Regs., tit. 2, § 11065, subd. (e)(3).
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- 135 *Green v. State* (2007) 42 Cal.4th 254, 258 ["[T]he FEHA requires employees to prove that they are qualified individuals under the statute just as the federal ADA requires."]; Cal. Code of Regs., tit. 2, §§ 11065, subd. (o) ["'Qualified individual,' for purposes of disability discrimination under California Code of Regulations, title 2, section 11066, is an applicant or employee who has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."], 11066, subd. (a) ["An applicant or employee has the burden of proof to

establish that the applicant or employee is a qualified individual capable of performing the essential functions of the job with or without reasonable accommodation.”].

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- 136 *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947; Cal. Code of Regs., tit. 2, § 11065, subd. (r) [“‘Undue hardship’ means, with respect to the provision of an accommodation, an action requiring significant difficulty or expense incurred by an employer or other covered entity, when considered under the totality of the circumstances in light of the following factors: . . . ”].
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- 137 *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947; Cal. Code of Regs., tit. 2, § 11065, subd. (r).
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- 138 For other factors, see Cal. Code of Regs., tit. 2, § 11065, subd. (r).
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- 139 *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.
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- 140 See *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 237 [“An adverse employment decision cannot be made ‘because of’ a disability, when the disability is not known to the employer. Thus, in order to prove an ADA claim, a plaintiff must prove the employer had knowledge of the employee’s disability when the adverse employment decision was made.”].
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- 141 *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 887.
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- 142 *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 887.
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- 143 *Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986, 1013; Cal. Code of Regs., tit. 2, § 11069, subd. (b).
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- 144 *Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971.
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- 145 *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236–237.
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- 146 Cal. Code of Regs., tit. 2, § 11069, subd. (d)(1).
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- 147 Cal. Code of Regs., tit. 2, § 11069, subd. (f).
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- 148 Gov. Code, § 12940, subd. (n); Cal. Code of Regs., tit. 2, § 11069.
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- 149 *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1195.
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150	Gov. Code, § 12940, subd. (n).
151	Cal. Code of Regs., tit. 2, § 11069, subd. (a).
152	<i>Gelfo v. Lockheed Martin Corp.</i> (2006) 140 Cal.App.4th 34, 54.
153	Cal. Code of Regs., tit. 2, § 11069, subds. (c)(2), (d)(1), (f).
154	Cal. Code of Regs., tit. 2, § 11069, subd. (g).
155	Cal. Code of Regs., tit. 2, § 11069, subd. (g).
156	<i>Swanson v. Morongo Unified School Dist.</i> (2014) 232 Cal.App.4th 954, 971 [“an employer's failure to properly engage in the process is separate from the failure to reasonably accommodate an employee's disability and gives rise to an independent cause of action”].
157	Labor Code, §§ 1025.
158	Labor Code, § 1025.
159	Labor Code, § 1025.
160	Labor Code, § 1027.
161	Labor Code, § 1026.
162	<i>Caldwell v. Paramount Unified School Dist.</i> (1995) 41 Cal.App.4th 189, 195 [“In order to prevail under the disparate treatment theory, an employee must show that the employer harbored a discriminatory intent.”].
163	<i>Harris v. City of Santa Monica</i> (2013) 56 Cal.4th 203, 215.
164	<i>Davis v. Farmers Ins. Exchange</i> (2016) 245 Cal.App.4th 1302, 1320; Cal. Code of Regs., tit. 2, § 11009, subd. (c).
165	<i>Mixon v. Fair Employment & Housing Comm.</i> (1987) 192 Cal.App.3d 1306, 1319.
166	<i>Davis v. Farmers Ins. Exchange</i> (2016) 245 Cal.App.4th 1302, 1320.
167	<i>Alamo v. Practice Management Information Corp.</i> (2013) 219 Cal.App.4th 466, 476; <i>Harris v. City of Santa Monica</i> (2013) 56 Cal.4th 203, 241.
168	<i>Caldwell v. Paramount Unified School Dist.</i> (1995) 41 Cal.App.4th 189, 195 [“In order to prevail under the disparate treatment theory, an

employee must show that the employer harbored a discriminatory intent.”].

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- 169 *Scotch v. Art Inst. of California* (2009) 173 Cal.App.4th 986, 1002.
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- 170 *Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 335, fn. 15 [97 S.Ct. 1843, 1854] [“Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. [Citations.] Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.”].
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- 171 *Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 129.
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- 172 Gov. Code, § 12965, subd. (c)(6) [“In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees.”].
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- 173 Gov. Code, § 12965, subd. (c)(6).
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- 174 Gov. Code, § 12960, subd. (c).
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- 175 *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724 [“Under California law 'an employee must exhaust the . . . administrative remedy' provided by the Fair Employment and Housing Act, by filing an administrative complaint with the California Department of Fair Employment and Housing (DFEH)”]; *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 90 [“Before a person may file a civil complaint alleging a violation of this statute, he or she must first file an administrative claim with the DFEH.”].
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- 176 Gov. Code, § 12960, subd. (c).
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- 177 *Surrell v. Cal. Water Serv.* (9th Cir. 2008) 518 F.3d 1097, 1104 [“Although Surrell never filed a charge directly with the EEOC, her charge filed with the State Employment Department is deemed filed with the EEOC pursuant to a worksharing agreement between the two entities.”].
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- 178 Gov. Code, § 12965, subd. (c)(1)(A) [“[I]f a civil action is not brought by the department pursuant to subdivision (a) within 150 days after the

filing of a complaint, or if the department earlier determines that no civil action will be brought pursuant to subdivision (a), the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on request, the right-to-sue notice.”].

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- 179 Gov. Code, § 12965, subd. (c)(1)(A).
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- 180 Gov. Code, § 12960, subd. (e)(5).
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- 181 Gov. Code, § 12965, subd. (c)(1)(D).
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- 182 Gov. Code, § 12960, subd. (f)(1)(B)(ii), added by Stats. 2025, ch. 321, § 2 (SB 477), effective January 1, 2026.
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- 183 42 U.S.C. §§ 2000e-5(e)(1), 12117.
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- 184 42 U.S.C. §§ 2000e-5(f)(1), 12117; *Quinn v. U.S. Bank NA* (2011) 196 Cal.App.4th 168, 187 [“A civil action on an ADA claim must be filed within 90 days after the EEOC issues a right-to-sue letter.”].
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- 185 *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354; Cal. Code of Regs., tit. 2, § 11066.
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- 186 *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307; *Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 129.
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- 187 *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 367.
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- 188 *Green v. State of California* (2007) 42 Cal.4th 254, 262.
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- 189 Cal. Civil Jury Instructions (CACI), No. 2540 [essential factual elements of a disparate treatment disability discrimination claim]; see also *Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 129.
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- 190 *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1749 [“[I]t is the plaintiff's burden to prove by a preponderance of the evidence a prima facie case of discrimination.”]; Evid. Code, § 500.
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- 191 *Claudio v. Regents of the Univ. of California* (2005) 134 Cal.App.4th 224, 229; Evid. Code, § 115; Cal. Civil Jury Instructions (CACI), No. 200.
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- 192 *Hersant v. Dep't of Social Services* (1997) 57 Cal.App.4th 997, 1002–1003.
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- 193 *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1749.
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- 194 *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310.
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- 195 *Hersant v. Dep't of Social Services* (1997) 57 Cal.App.4th 997, 1002; *Tex. Dep't of Cmty. Affairs v. Burdine* (1981) 450 U.S. 248, 254 [101 S.Ct. 1089, 1094] ["If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case."].
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- 196 *Clark v. Claremont Univ. Ctr.* (1992) 6 Cal.App.4th 639, 664.
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- 197 *Clark v. Claremont Univ. Ctr.* (1992) 6 Cal.App.4th 639, 665.
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- 198 See Gov. Code, § 12940, subd. (m); Cal. Civil Jury Instructions (CACI), No. 2541.
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- 199 Gov. Code, § 12940, subd. (a)(1); *Green v. State of California* (2007) 42 Cal.4th 254, 262.
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- 200 See Gov. Code, § 12926, subd. (f)(2); Cal. Code of Regs., tit. 2, § 11065, subd. (e)(2).
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- 201 Gov. Code, § 12926, subd. (f)(2); Cal. Code of Regs., tit. 2, § 11065, subd. (e)(2).
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- 202 *Brown v. Superior Court* (1984) 37 Cal.3d 477, 484.
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- 203 *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California."].
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- 204 Cal. Rules of Court, rule 8.1115, subd. (a) ["[A]n opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action."].
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- 205 *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 764 ["[T]he decisions of the lower federal courts are not binding precedent [citations], particularly on issues of state law."].
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- 206 *People v. Bradley* (1969) 1 Cal.3d 80, 86 ["[A]lthough [the Supreme Court of California is] bound by decisions of the United States Supreme Court interpreting the federal Constitution [citations], [the Supreme Court of

California is] not bound by the decisions of the lower federal courts even on federal questions. However, they are persuasive and entitled to great weight.”].

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- 207 See, e.g., *Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 635; *Reno v. Baird* (1998) 18 Cal.4th 640, 647 [“Because the antidiscrimination objectives and relevant wording of title VII of the Civil Rights Act of 1964 (Title VII) [citations], the Age Discrimination in Employment Act (ADEA) [citations] and the Americans with Disabilities Act (ADA) [citations] are similar to those of the FEHA, California courts often look to federal decisions interpreting these statutes for assistance in interpreting the FEHA.”].
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- 208 *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 948.
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- 209 See, e.g., *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1336–1337 [relying on multiple state agency decisions for the proposition that supervisors could be held liable as agents of the employer under FEHA].
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- 210 *Di Giorgio Fruit Corp. v. Dep't of Employment* (1961) 56 Cal.2d 54, 61–62.
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- 211 *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 234.
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- 212 *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1417 [“Although the ultimate interpretation of a statute rests with the courts, consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect and enforcing it, is entitled to great weight and will be followed unless clearly erroneous.”].
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- 213 See, e.g., *Reno v. Baird* (1998) 18 Cal.4th 640, 660–661 [rejecting the CRD's consistent holdings that supervisors were individually liable as agents of the employer for their acts of discrimination].
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- 214 Gov. Code, § 12935, subd. (a).
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- 215 *Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 632.
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- 216 *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1104.
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- 217 42 U.S.C. §§ 12111(1), 12117(b); 29 C.F.R. § 1630.1(a).
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- 218 29 C.F.R. § 1630.1(a).
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219	<i>Cassista v. Community Foods, Inc.</i> (1993) 5 Cal.4th 1050, 1063.
220	<i>Bagatti v. Dep't of Rehabilitation</i> (2002) 97 Cal.App.4th 344, 358.
221	<i>Dyna-Med, Inc. v. Fair Employment & Housing Com.</i> (1987) 43 Cal.3d 1379, 1387 ["Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation."].
222	<i>Dyna-Med, Inc. v. Fair Employment & Housing Com.</i> (1987) 43 Cal.3d 1379, 1387 ["Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent."].
223	Cal. Const., art. I, § 16; Code Civ. Proc., § 618.
224	Fed. R. Civ. Proc., rule 48(b) ["Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members."].
225	28 U.S.C. § 1441, subd. (a).
226	28 U.S.C. § 1331.
227	28 U.S.C. § 1332.
228	28 U.S.C. §§ 1332, subd. (d)(2), 1453.